

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: <u>June 29, 2011</u>

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

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IN RE:                                     :
FOSAMAX PRODUCTS LIABILITY LITIGATION    : No. 06 MD 1789 (JFK)
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This document relates to all actions.      : ORDER
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JOHN F. KEENAN, United States District Judge:

I. Background

In its February 4, 2011 Order, the Court directed counsel for Merck Sharp & Dohme Corp. ("Merck") and the Plaintiffs' Steering Committee (the "PSC") to confer and select two cases for trial as bellwethers that concern allegations of injury after the Fosamax label change in July 2005. The Court directed the parties to include one case alleging Fosamax use prior to the July 2005 label change and another alleging Fosamax use beginning after the July 2005 label change. The parties failed to reach an agreement on the selection of cases, and during a telephone conference held on May 16, 2011, the Court scheduled Jellema v. Merck & Co., Inc., No. 09 Civ. 4282 (JFK), for trial on May 7, 2012, at 10:00 a.m. Because Jellema is a case alleging both use and injury following the July 2005 label change, the Court directed the parties to again confer and select a case involving Fosamax use before July 2005 and injury after July 2005.

In discussing the selection of an additional case, the parties failed to agree on a process for the waiver of Lexecon

rights. See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998). The Court then directed the parties to submit a list of cases that satisfy the relevant criteria of the Court's February 4, 2011 Order and for which venue is proper in the Southern District of New York. The Court indicated that it would randomly select a case from this list. On Thursday, June 23, 2011, the parties jointly submitted a list with nine cases. On Monday, June 27, 2011, the parties submitted letters to the Court objecting to the inclusion of certain cases in the trial selection pool.

II. Cases Excluded from the Trial Selection Pool

Both parties agree that Ross-Epstein v. Merck & Co., Inc., 08 Civ. 9950 (JFK) is inappropriate for inclusion in this case because the alleged injury date is prior to July 2005. The Court will not include Ross-Epstein in the trial selection pool.

The plaintiff in Pauling-Jones v. Merck & Co., Inc., 07 Civ. 6427 (JFK), has filed a motion for voluntary dismissal under Rule 41(a)(2) of the Federal Rules of Civil Procedure. Due to this pending motion, Pauling-Jones is inappropriate for inclusion in the trial selection pool.

The PSC objects to the inclusion of Heath v. Merck & Co., Inc., 08 Civ. 3197 (JFK) in the trial selection pool, and argues that Heath does not satisfy the requirements of the Court's February 4, 2011 Order because the plaintiff was never

prescribed Fosamax after the July 2005 label change. The Court agrees with the PSC, and will not include Heath in the trial selection pool.

Merck objects to the inclusion of Newman v. Merck & Co., Inc., 09 Civ. 4296 (JFK), and argues that the plaintiff's medical records suggest her injury took place prior to the July 2005 label change. The PSC argues that the Plaintiff's Profile Form in Newman gives an injury date in 2007. The Court declines to include Newman in the pool of cases eligible for selection because of the apparent factual dispute concerning the plaintiff's injury date. In excluding Newman, the Court makes no determination about the timing of the plaintiff's injury.

III. Random Trial Selection Procedure

In light of the Court's rulings on the parties' objections, the trial selection pool will consist of the following five cases:

- (1) Fasolino v. Merck & Co., Inc., 07 Civ. 9881 (JFK)
- (2) Scheinberg v. Merck & Co., Inc., 08 Civ. 4119 (JFK)
- (3) Diamond v. Merck & Co., Inc., 08 Civ. 4204 (JFK)
- (4) Spano v. Merck & Co., Inc., 09 Civ. 6948 (JFK)
- (5) Dicheck v. Merck Sharp & Dohme Corp., 10 Civ. 5328 (JFK)

At noon on Thursday, June 30, 2011, in Courtroom 18-C, the Court will direct Deputy Clerk William Ryan to place one card for each of these five cases in the wheel used for juror selection. After Mr. Ryan spins the wheel, the Court or its

designee will select a card. The Court will then schedule the case indicated on that card for trial. Although counsel for Merck and the PSC may attend the selection, they are not required to attend. A stenographic record of the proceedings will be kept.

SO ORDERED.

Dated: New York, New York
June 28, 2011

A handwritten signature in cursive script, reading "John F. Keenan", written in dark ink. The signature is positioned above a horizontal line.

JOHN F. KEENAN
United States District Judge